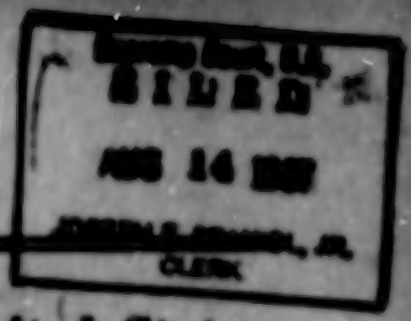
No. 87-137



In The

Supreme Court of the United States

October Term, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a separate claim for racial harrassment must be submitted to the jury under 42 U.S.C. Section 1981, independent of a claim for discriminatory promotion and discharge?

2. Whether the Plaintiff in a claim under 42 U.S.C. Section 1981 has the burden of proof of showing that she was better qualified than another employee who was promoted after the employer has offered evidence that relative qualifications were the basis of such promotion and that the employee promoted was more qualified.

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BRIEF OF RESPONDENT IN OPPOSITION

The Respondent, McLean Credit Union, opposes Petitioner's Request for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit and respectfully submits this Response:

STATEMENT OF FACTS

Petitioner was employed by Respondent in 1972 as a File Co-ordinator and terminated in 1982. Susan Williamson, a white, was hired by the Respondent in 1974 as an Accounting Clerk.[1] Between 1972 and 1982 the maximum number of such employees employed by the Respondent was nine, including the Petitioner.[2]

During her employment at McLean, Petitioner never asked or made any inquiry for any promotion to or training for an accounting position or any other position.[3] During Williamson's employment at McLean, she worked solely in the accounting area.[4]

In 1982, Williamson received a title change from "Account Junior" to "Account Intermediate." There were no changes in Williamson's job responsibilities, functions or supervisor subsequent to the "promotion." There was no job vacancy before or after Williamson's "promotion." The Respondent hired no other employees after Williamson's "promotion." Williamson received a pay increase and title change but continued her same duties.[5]

Petitioner had no experience, aptitude or qualifications to perform the Accountant job. Evidence showed that Williamson was more qualified than Petitioner to do each job function required for the accounting position.[6]

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[1]Transcript of Trial, Vol. 3 at p. 105.

[2]*Id.*, Vol. 3 at p. 83.

[3]*Id.*, Vol. 2 at pp. 61-62.

[4]*Id.*, Vol. 2 at p. 53.

[5]Tr. of Trial, Vol. 4 at pp. 26-28.

[6]*Id.*, Vol. 4 at pp. 28-30.

Each year from 1980 through 1984, Williamson's annual evaluations exceeded Petitioner's.[7]

Petitioner's application test showed that Petitioner attempted to answer only 4 of the 15 mathematics questions, only one of which was correctly answered.[8]

When Petitioner worked part-time as a teller, she indicated to the President of McLean that such work was too much pressure. There was evidence that Petitioner was not good at "balancing" and made numerous errors. Petitioner indicated that she did not want to do teller work.[9] Further, the accounting positions required more numerical aptitude and bookkeeping skills than the teller position which Petitioner could not adequately perform.[10]

Petitioner alleges that she was discriminated against because of the "promotion" received by Williamson.[11]

The record reflects only two allegations of racial remarks. At the time of Petitioner's initial interview in 1972, Respondent's President allegedly informed her that she would be working only with white women.[12] The only other statement which Petitioner testified was a racial remark was the statement allegedly attributed to Respondent's President that—"blacks were slower than whites

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[7]*Id.*, Vol. 4 at pp. 33-35.

[8]*Id.*, Vol. 4 at pp. 95-97; Trial Exhibit 21.

[9]*Id.*, Vol. 3 at pp. 103-104.

[10]*Id.*, Vol. 4 at pp. 37-38.

[11]*Id.*, Vol. 1 at pp. 46-48.

[12]*Id.*, Vol. 1 at p. 19. (Although this alleged instance is far outside the applicable three year statute of limitations, the District Court allowed the testimony as background and to support the element of "intent" required in a Section 1981 case.)

by nature.'"[13] Although Petitioner complains that she received personal criticism during staff meetings, the record is clear that such criticisms were business related, were made without personal comment and admittedly reflected errors which she had made prior to the date of the meeting.[14]

There was no formal training available to any clerical employee and no employee including Williamson received any job training that was not available to all employees.[15]

Petitioner misleads the Court by asserting that she was "unable to find out about promotions that were available" and that "a number of white employees were promoted over her who had less education and seniority."[16] In fact Petitioner offered evidence at trial of only one promotion for which she contended she was the object of racial discrimination—that of Williamson to the position of Account Intermediate.[17] Further Petitioner offered no evidence that either education or seniority were criteria used by Respondent in making promotions.[18]

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[13]*Id.*, Vol. 1 at p. 88.

[14]*Id.*, Vol. 1 at p. 89; Vol. 2 at pp. 72-78.

[15]The only evidence offered by the Petitioner of discriminatory training opportunities was her own direct testimony consisting of a single unsubstantiated allegation that Williamson "was given special training for this position." (*Id.*, Vol. 1, p. 49). Petitioner offered no evidence describing what this "special training" consisted of. In contradiction, the Respondent showed that Williamson did not receive any special training, (*Id.*, Vol. 4, pp. 28, 30), and that the employer had no formal training programs (*Id.*, Vol. 4, p. 38).

[16]Petition at p. 9.

[17]Transcript of Trial at Vol. 1 at pp. 46-47.

[18]Nevertheless, greater education and seniority do not outweigh more direct experience. *Young v. Lehman*, 748 F.2d 194, 198 (4th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985).

REASONS FOR DENYING THE WRIT

The Fourth Circuit Court of Appeals has ruled that a separate independent claim for racial harassment is not cognizable under 42 U.S.C. Section 1981.[19] This ruling is not in conflict with any Circuit Court decision or any decision of this Court. The Fourth Circuit decision does not change existing law that racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under Section 1981, and that it may give rise to a discrete claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[20] Petitioner has cited no case to the Court which holds that a separate issue of racial harassment should be submitted to the jury in a Section 1981 case, except in cases where a parallel cause of action has been brought under Title VII. Petitioner declined to bring a parallel cause of action under Title VII. However, Petitioner presented evidence of alleged racial harassment to support her claims for discrimination in promotion and layoff and an issue of punitive damages was submitted to the jury.[21]

Regarding the jury charge on the issue of relative qualifications, Petitioner concedes that the District Court correctly relied on prior Fourth Circuit precedents.[22] Although Petitioner contends there are holdings contrary to

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[19]Appendix to Petition at p. 7a, *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986).

[20]*See, e.g. EEOC v. Murphy Motor Freight*, 488 F.Supp. 381, 384 (D.Minn. 1980); *United States v. Buffalo*, 457 F.Supp. 612, 632-637 (W.D.N.Y. 1978).

[21]Appendix to Petition at p. 28a.

[22]Petition at p. 6.

the Fourth Circuit Rule, a true analysis of the cases cited shows otherwise. Respondents submit that the Petitioner has cited no case in conflict with the charge given by the District Court.

I.

THE FOURTH CIRCUIT'S RULING THAT A SEPARATE CLAIM FOR RACIAL HARASSMENT WAS NOT COGNIZABLE UNDER SECTION 1981 IS NOT INCONSISTENT WITH THE DZCISIONS OF OTHER FEDERAL COURTS OF APPEALS.

Petitioner cites several cases in support of her contention that the ruling of the Fourth Circuit is in conflict with the decisions of Federal Courts. Respondent contends that these cases are no more enlightening than other cases previously cited by the claimant and about which the Fourth Circuit observed: "none directly holds that racial harassment gives rise to a discrete claim under Section 1981 as distinguished from recognizing that racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under Section 1981 and that it may give rise to a discrete Title VII claim."[23]

In *Hamilton v. Rogers*, 791 F.2d 439 (5th Cir. 1986), the claimant brought claims under Sections 1981, 1983 and Title VII for alleged racial harassment and retaliation. The Court (on rehearing) held that the employer was liable only under Title VII. *Id.* at 445.

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[23]Appendix to Petition at pp. 9a-10a, *Patterson*, 805 F.2d at 1146.

In support of her contentions, Petitioner misstates and misuses a partial quote from *Hamilton* as follows: "an offensive work environment caused by racial harassment 'would . . . establish a successful case under 42 U.S.C. Sections 1981 and 1983 . . . ' "[24] A complete reading of the appropriate part of the Opinion shows that the Court is restating the familiar *McDonnell-Douglass*[25] proof scheme. The Court concludes its analysis by stating: "Successfully meeting these requirements [the *McDonnell-Douglass* proof scheme] would also establish a successful case under 42 U.S.C. Sections 1981 and 1983; *when* these Statutes are used as *parallel causes of action with Title VII*, they require the same proof to show liability." *Id.* at 442. (Emphasis added). *Hamilton* holds only that the *McDonnell-Douglass* proof scheme is applicable to proof of Section 1981 claims, not that Section 1981 requires submission of a separate issue of racial harassment.

Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984) is cited for the proposition that compensatory damages for humiliation and other emotional harm resulting from "the atmosphere of harassment" were appropriate.[26] Respondents do not take issue with this specific statement of law. However, the issues presented to the jury in *Carter* are not set forth in the Opinion and there is certainly no holding that a specific, independent, issue for racial harassment must be submitted to the jury in a Section 1981 claim.

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[24]Petition at pp. 13-14.

[25]*McDonnell-Douglass Corp. v. Greene*, 411 U.S. 792 (1973).

[26]Petition at p. 14.

In fact, the *Carter* Court discusses in detail the probability that the judgment was substantially comprised of actual damages for compensation differential and a small remainder accounting for the humiliation and emotional harm incidental thereto. *Carter*, 727 F.2d at 1238. The implication is that a single issue was presented concerning Plaintiff's claim for intentional discrimination under Section 1981, said issue inclusive of Plaintiff's alleged claims of racially discriminatory hiring, firing, promotion and compensation differential, as well as intangible injuries suffered because of humiliation and emotional harm.

The Respondent does not contend that humiliation is not a compensable injury under Section 1981, only that any damages therefore are incidental to and must arise from activities prohibited by Section 1981. If the jury in the case at bar had answered affirmatively the issues against the Respondent with regard to Petitioner's claim for discrimination in layoff and promotion, then the jury could have properly awarded (if the facts supported) damages for racial harassment. This the jury declined to do.

In *Ramsey v. American Air Filter Co.*, 772 F.2d 1303 (7th Cir. 1985), the Plaintiff alleged that the Defendant violated Section 1981 by subjecting him to terms and conditions of employment different from those that applied to non-minority employees. In particular, the Plaintiff alleged improper layoff, denial of requests to fill job openings, discriminatory disciplinary measures and racial harassment. The jury affirmatively answered two issues: " . . . [1] Whether Defendant intentionally subjected Plaintiff to different terms and conditions of employment because of his race; and, [2] . . . whether Defendant's conduct was malicious, wanton or oppressive." *Id.* at 1306.

One issue was presented to the jury under Section 1981 encompassing all of Plaintiff's claims and there is no holding by the Court that an issue of racial harassment must be submitted to the jury separate from issues concerning improper layoff or failure to promote. The issue in *Ramsey* is phrased differently than the issues presented in the case at bar, but the substance is the same. Any alleged racial harassment is included with the issues of improper layoff and promotion. In the case at bar, the District Court allowed evidence of racial harassment and charged the jury regarding damages for humiliation, embarrassment, anxiety and emotional distress.[17]

Plaintiff cites *Block v. R.H. Macy and Co.*, 712 F.2d 1241 (8th Cir. 1983) in support of her contention that recovery is permitted under Section 1981 for emotional distress caused by racial harassment in employment. Respondent does not contend otherwise where, as in *Block*, the fact finder has determined that there was an improper discharge or a collateral finding of a violation of Title VII. *Block* was prosecuted under both Title VII and Section 1981 and Respondent is aware of no Section 1981 cases from the Eighth Circuit which require an independent issue of racial harassment to be submitted in a Section 1981 case absent a parallel cause of action for an alleged violation of Title VII.

In *Block*, the Circuit Court affirmed the award of compensatory and punitive damages under Section 1981 as compensation for Plaintiff's *discharge* from employment resulting from racial discrimination.

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[17]Tr. of Trial, Vol. 5, pp. 18-19.

Likewise, in *Wilmington v. J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986), the opinion of the Court does not specifically indicate that a separate issue of racial harassment was submitted to the jury under Section 1981. The clear implication is that the issue presented by the Plaintiff was whether he was intentionally discriminated against by reason of his discharge. *Id.* at 914. The specific incidences of discrimination outlined by the Court, *Id.* at 915, and cited by the Petitioner,[28] may be evidence of discrimination, but do not require the submission of a separate issue of racial harassment under Section 1981.

Plaintiff has failed to cite any case holding that a separate issue of racial harassment is cognizable under Section 1981 and has failed to cite any case inconsistent with the opinion of the Fourth Circuit.

II.

THE DECISION BELOW IS NOT INCONSISTENT WITH OTHER DECISIONS OF THIS COURT.

Goodman v. Lukens Steel Co., 580 F.Supp. (E.D.Pa. 1984), *modified* 777 F.2d 113 (3rd Cir. 1986), *aff'd*, 55 U.S.L.W. 4881 (1987) is prosecuted under both Section 1981 and Title VII. There is no holding that an individual Plaintiff is entitled to a separate discrete issue of disparate treatment when prosecuting a case under Section 1981 alone. The District Court specifically indicated that disparate impact was not actionable under Section 1981. 580 F. Supp. at 1121. By implication, disparate treatment

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[28]See, Petition at p. 15, n.14.

cases are likewise barred under Section 1981 and should be brought under Title VII.

In *Howard v. Lockheed Georgia Co.*, 372 F. Supp. 854 (N.D. Ga. 1974), the Court rejected an attempt to use Section 1981 for the purpose of seeking emotional distress damages.[29]

Shaare Tefila Congregation v. Cobb, 55 U.S.L.W. 4629 (1987) holds only that Jews were among the peoples considered to be distinct races, and therefore, within the protection of Section 1982. *Shaare Tefila Congregation* is not relevant to the case at bar.

Petitioner also cites *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), for the proposition that the terms, conditions and privileges of employment clearly include benefits that are part of an employment contract. However, *Hishon* was prosecuted solely under Title VII.

Petitioner was not without a remedy for any alleged racial harassment or disparate treatment for she could have brought a claim under Title VII. Having declined or failed to bring a Title VII action, she now asks this Court to allow her relief under Section 1981, which would effectively by-pass the purposes of Title VII.

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[29]The Court stated:

> "[T]o judicially legislate a current and broader remedy under Section 1981 would invite every Plaintiff asserting a claim for racially discriminatory employment practices to ignore the remedy which Congress so carefully constructed in Title VII. Why should a Claimant genuinely participate in the conciliation procedures of Title VII, or his attorney advise him to do so, when larger awards await if he refuses and proceeds to suit? Such a holding would frustrate the clear intent of Congress that racial bias problems be resolved by conciliation. This the Court declines to do."

372 F. Supp. at 857-858.

III.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS RELATING TO THE BURDEN OF PROOF DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Decision Below Does Not Conflict With Texas Department of Correction v. Burdine.

The District Court instructed the jury that in order for the Petitioner to prevail upon the issue of promotion discrimination, it was necessary that she prove that she was more qualified to receive the promotion than the person receiving such promotion and that under Section 1981 she must show intentional discrimination. The Petition correctly states that the District Court relied on prior Fourth Circuit precedents and that therefore the instruction was correct.[30]

However, Petitioner is incorrect in her contention that these instructions and Fourth Circuit cases[31] are in conflict with the holdings of this Court and other circuits. In support of her contention, Petitioner cites *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, it was unanimously held that after the Plaintiff in a job discrimination suit under Title VII had proved a *prima facie* case of discrimination, the *Defendant* bears only the burden to articulate some legitimate non-discriminatory reason for its actions and need

[30]Petition at p. 6.

[31]*Young v. Lehman*, 748 F.2d 194 (4th Cir. 1984) *cert. denied*, 471 U.S. 1061 (1985); *Anderson v. City of Bessemer City*, 717 F.2d 149 (4th Cir. 1983), *rev'd* on other grounds, 470 U.S. 564 (1985).

not prove either the existence of such reasons by a preponderance of the evidence or that the person selected instead of the Plaintiff was better qualified. *Id.* at 253-254. In effect, the *Burdine* Court relaxed the burden placed upon the employer by the Fifth Circuit Court of Appeals which required the employer to show that the Plaintiff's objective qualifications were inferior to those of the person selected. This Court rejected that rule and reiterated that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* at 259.

If the employer has the discretion to choose between equally qualified candidates, and there is no evidence of unlawful criteria, then surely it is in incumbent upon a plaintiff to show that she is "more qualified" in order to prevail, where she has offered no other evidence of pretext.

B. The Decision Below Is Not In Conflict With The Decisions Of Other Circuits.

Respondent is aware of no holdings from other circuits in conflict with the Fourth Circuit Rule or the charge given by the District Court.

First, the Petition implies that the District Court Judge instructed the jury that the Plaintiff must show that she was better qualified than the person who received the promotion in order to make out a *prima facie* case.[32] In fact, the Trial Judge, outside the hearing of the jury, stated to counsel that "the law in the Fourth Circuit seems to be that in order to make out a *prima facie* case

[32]Petition at p. 5 n. 2; *Id.* at p. 29.

you must show that you are better qualified than the person who received the promotion."[33]

Although Petitioner has seized on this statement by the Court as an apparent misstatement of the law, such comments by the Court are not pertinent because they were made outside the hearing of the jury and because once such a case has been fully tried on the merits the question whether the Plaintiff has established a *prima facie* case is no longer relevant. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983); *Mitchell v. Baldridge*, 759 F.2d 80 (D.C. Cir. 1985).

Secondly, Petitioner contends that she does not have to show superior qualifications after relative qualifications are proferred by the employer as rebuttal.[34] However, all of the cases cited by the Petitioner address the issue of the initial burden of establishing a *prima facie* case and are totally irrelevant to the case at bar. Respondent does not dispute that the law requires a Plaintiff to prove only that she is qualified for the position in order to establish a *prima facie* case; but such statement of law is irrelevant because this case went beyond the *prima facie* stage and Respondent offered relative qualifications as a non discriminatory reason for its decision. To rebut, Petitioner must show that she is "more qualified" or some

[33]Tr. of Trial, Vol. 5 at pp. 29-31.

[34]In support Petitioner cites: *Mitchell*, 759 F.2d 80; *Christensen v. Equitable Life Assurance Soc'y of United States*, 767 F.2d 340, 342-343 (7th Cir. 1985), cert. denied 106 S.Ct. 885 (1986); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983); *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1460 (9th Cir. 1985) cert. denied, 106 S.Ct. 1267 (1986); *Grano v. Department of Dev. of The City of Columbus*, 637 F.2d 1073, 1079 (6th Cir. 1980).

other pretext on the part of the employer or some other unlawful criteria.

The District Court correctly instructed the jury in accordance with the Fourth Circuit rule and the Petitioner has cited no contrary rule.

Further, *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983) does not, as Petitioner suggests, hold that a showing of equal qualifications is necessarily sufficient to demonstrate pretext. Nor, does *Hawkins* hold contrary to the Fourth Circuit Rule that once an employer has proferred relative qualifications as a nondiscriminatory reason for its action, then it is incumbent upon the Plaintiff to show that she is more qualified than the successful candidate. In *Hawkins*, the trial Judge found that the Plaintiff was qualified, and that after her application was rejected, the employer continued to seek applicants with similar qualifications to those of the Plaintiff[35]. *Id.* at 813.

Likewise, in *Joshi v. Florida State Univ. Health Center*, 763 F.2d 1227, 1235 (11th Cir.) *cert. denied*, 106 S.Ct. 347 (1985), the facts are distinguishable from the facts of this case. In *Joshi*, the employer failed to rebut the *prima facie* case, because they failed to show that relative qualifications of the applicants were considered. In the case at bar, the Respondent more than re-

[35]The Court made a Finding of Fact that under the evidence presented, the explanation proferred by the employer was pretextual because the employer continued to seek other applicants with similar qualifications. Those facts are distinguishable from the case at bar where Williamson received only a title change, there was no job vacancy and Petitioner was not qualified for the position (See n.5, *supra*).

butted the Petitioner's *prima facie* case with substantial evidence of vastly superior qualifications by Ms. Williamson.[36] In fact, Respondent strongly questions whether Petitioner presented a *prima facie* case or was entitled to survive a Motion for Directed Verdict because of her failure to show even that she was qualified for the position.[37] The employer has the right to fix the qualifications that are necessary or preferred in selecting an employee for promotion, and in order to make out a *prima facie* case, a Plaintiff must establish that she meets these qualifications. *E.E.O.C. vs. Federal Reserve Bank of Richmond*, 698 F.2d 633, 671 (4th Cir. 1983) *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984).

Although Petitioner claims that she was prevented from being considered for the "promotion" because of a discriminatory denial of training, the record offers no support for such contentions.[38] Further Petitioner offers no authority in support of such contention. However, even assuming the existence of such authority, it would not be relevant to these facts where there was no evidence of any training to any clerical employees.

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[36]See, n. 4-6, *supra*.

[37]See n. 7-10, *supra*.

[38]See n. 15, *supra*.

CONCLUSION

For the reasons stated, the Petition should be denied and the Opinion of the United States Court of Appeals for the Fourth Circuit affirmed. The Fourth Circuit's decision is not in conflict with the decisions of this Court or any Circuit Court of Appeals.

Respectfully submitted,

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Dated August 13, 1987

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